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PAM SHIPPING LTD.

v.

MPC HOLDINGS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR

VC GEORGE J

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[CIVIL SUIT NO. C 536 OF 1981]

8 FEBRUARY 1984

CIVIL PROCEDURE: *Judgment in default of appearance - Application to set aside - Whether plaintiffs had cause of action - Award of American arbitration panel - Whether "final".*

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An American arbitration panel, constituted in accordance with the arbitration clause of the charter-party between the plaintiffs as owners and the defendants as charterers, handed down what was certified as the "final award" of the panel on 9 October 1980. By the award, the defendants were directed to pay the plaintiffs, *inter alia*, the sum of US\$259,615.85. The award provided for it to be enforced and reduced to judgment in the United States District

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for the Southern District of New York in accordance with s. 9 of the U.S. Arbitration Act. The award was reduced to a judgment of the U.S. District for the Southern District of New York on 14 May 1982. Almost a year earlier, however, on 15 May 1981 the owners had caused the writ in the case before the Court to issue against the defendants, claiming the amount awarded in the arbitration. On 1 October 1981 judgment in default of appearance was entered against the defendants. Three months later the defendants filed an application to have the judgment set aside, contending that at all relevant times they had wanted to defend the action.

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The defendants argued that the plaintiffs had proceeded to enforce the award as though it was a foreign judgment, when in fact it was not. They also submitted that the plaintiffs had no cause of action at the time of the issue of the writ for the award of the panel had not been reduced into a judgment of the Courts of the U.S.A. yet and could not be said to be a "final" award.

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Held:

[1] The contention that the default judgment entered into by the plaintiffs was irregular had no merit. The plaintiffs had not been attempting to enforce the award as a foreign judgment or at all but had sought a judgment against the defendants in our Courts, the cause of action being what was held out to be the final award of the American arbitrator. By common law and equity the aid of the Court can be sought in this manner. (*Bremer Oeltransport GMBH v. Drewry* [1933] 1 KB 753).

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[2] However, the defendants had raised arguable defences which provided them with a defence on the merits and in the circumstances of the case, the discretion of the Court ought to be exercised in their favour. (*Badat & Co. v. East India Trading Co.* [1964] AIR SC 538; *Meerifield, Ziegler v. Liverpool Cotton Association* [1912] 105 LTR 97 at 105).

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*[Judgment set aside.]***Cases referred to:***Bremer Oeltransport GMBH v. Drewry* [1933] 1 KB 753*Badat & Co. v. East India Trading Co.* [1964] AIR SC 538*Meerifield, Ziegler v. Liverpool Cotton Association* [1912] 105 LTR 97

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Legislation referred to:

Arbitration Act 1952, s. 27

For the applicants/defendants - Rajaswary Kumarasamy; T/n Ng Ek Teong & Partners

For the respondents/plaintiffs - Raja Aziz Addruse (Lawrence Tan with him); T/n Lawrence Tan & Co.

JUDGMENT

VC George J:

An arbitration panel, constituted in accordance with the arbitration clause (as amended) of the charter party dated 16 August 1978 between PAM Shipping Limited as owner and MPC Holdings Sdn. Bhd. as charterer, after what appears to have been a full hearing at which both parties were represented, handed down its written award on 9 October 1980. The Chairman of the Panel has certified that the award dated 9 October 1980 was the “final award” of the Panel. By the award the charterer was directed to pay to the owner *inter alia* some US\$259,615.85.

The ultimate paragraph of the award reads as follows:

This award may be enforced and reduced to judgment in the United States District Court for the Southern District of New York in accordance with the United States Arbitration Act, 9 USC s. 1 *et seq.*

Section 9 of the United States Arbitration Act is as follows:

If the parties in their agreement have agreed that a judgment of the Court shall be entered upon the award made pursuant to the arbitration, and shall specify the Court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in ss. 10 and 11 of this title

The award was eventually on 14 May 1982 reduced to a judgment of the U.S. District Court for the Southern District of New York. However almost a year before this was done, on 15 May 1981 to be precise, the owner caused the writ in the instant case to issue against the charterer. By the writ the plaintiffs claim against the defendants the amount awarded in the said arbitration (less US\$12,000 said to have been paid by the defendants), interest as awarded by the panel and costs. Although duly served the defendants failed to enter an appearance to the writ and on 1 October 1981 judgment in default of appearance was entered against the defendants which they now seek to have set aside.

The defendants contend that at all relevant times they had wanted to defend the action. The explanation given for allowing the default judgment to be entered and not filing their application to set it aside till some 3 months later appears to be that the defendants’ Financial Controller, one K.K. Paniker having referred the fact of service of the writ to the defendants’ “in-house solicitors” was advised to have it referred to another firm of solicitors, M/s. Lewis & Co. Paniker then apparently went away to India without attending to the matter which appeared to have been overlooked until the defendants were served with a copy of the judgment when it would seem that it was realised that the writ had been misplaced and had not been attended to. Then came the request to the plaintiffs’ solicitors for a fresh copy of the writ and the retaining of another firm of solicitors followed by the application to set aside the judgment.

- a* The defendants have firstly pointed out that the claim was based on an award by a panel of arbitrators in the U.S.A. and argued that the plaintiffs have proceeded as if they were enforcing a foreign judgment, when in fact the award had not been reduced to a judgment of the Courts of the U.S.A. and that in any event The Reciprocal Enforcement of Judgments Act of 1958 is not applicable in respect of judgments of the American Courts. That line of argument is misconceived in that the plaintiffs have not been attempting to enforce the award
- b* as a foreign judgment or at all. Neither for that matter have the plaintiffs invoked s. 27 of the Arbitration Act 1952, by which section an award of an arbitrator (other than those caught by the terms of s. 34 of the Act) may by leave of the High Court be enforced as a judgment or order of Court. For example if the award was that one party has to pay the other an amount of money, leave of the Court may be obtained to recover the amount awarded, say, by the issue of a writ of seizure and sale.
- c* What the plaintiffs in the instant case have done is to seek a judgment (as opposed to enforcing a judgment) against the defendants in our Courts, the cause of action being what was held out to be the final award of the American arbitrators.
- By common law and equity the aid of the Court can be sought in respect of an arbitrator's award without invoking either the said s. 27 or (where they apply) the Convention or Rules referred to in the said s. 34. Apart from filing an action on the original cause of action it is perfectly in order in equity and at common law to sue on the cause of action provided by the award, the nonperformance whereof being a breach of the agreement under which the arbitration took place (*Bremer Oeltransport GMBH v. Drewry* [1933] 1 KB 753 at 759, 760 & 764, 765)."
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- e* Which as has been seen is what the plaintiffs in the instant action purported to do. The contention in the Statement of Claim was that there had been an agreement for submission followed by a hearing and handing down of an award in respect of which a substantial sum had not been paid. The writ was duly served and the time for appearance expired without appearance being entered. With the aid of an affidavit of service of the writ a certificate of non-appearance was obtained followed by judgment in default of appearance being entered.
- f* There had been due adherence of the requirements to enter default judgment and the defendants are not saying otherwise. What they have said as a second line of argument is that they have a good defence to the claim in that plaintiffs have relied on the award of the panel as their cause of action prematurely in that that award could not provide a cause of action until it had been reduced into a judgment of the Courts of the U.S.A. and at the time the writ was caused to issue (and when judgment was entered) there had not been such a reduction of the award into a judgment.
- g* The arbitration clause of the Charter Party is clause 31 which provides that the arbitration "... shall be conducted in conformity with the provisions and procedure of the U.S. Arbitration Act, and a judgment of the Court shall be entered upon any award made by the said arbitrator ..."
- h* It was no doubt with that provision in mind read together with the said s. 9 of the U.S. Arbitration Act that in the award itself was prescribed the Court for the enforcement and reduction to a judgment of the award. One interpretation of s. 9 is that by the granting of an order the Court confirms the award as opposed to vacating, modifying or correcting the award which it can be pursuant to ss. 10 and 11.
- i* For the defendants it has been submitted that until such confirmation the award cannot be said to be final and that until the award was in reality "final" it cannot provide a cause of action.

The judgment of the Indian Supreme Court in *Badat & Co. v. East India Trading Co.* [1964] AIR SC 538 was cited in support of the above contention. That judgment deals with the effect of the aforesaid s. 9 (or some provision of American law in *pari materia* with the s. 9). The Supreme Court took the view that where the situation was that the award of the arbitrators does not become final until a judgment had been obtained on the basis of the award and the award could not be enforced and only the judgment could be enforced then an action based on the award does not provide a cause of action in India.

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The Indian judgment appears to go further than the submission by Counsel for the defendants/applicants in that it lays down that even where the award was reduced to a judgment, a suit based on that judgment cannot provide a cause of action in India.

Thus the propositions laid down in *Badat & Co.* provide the defendants/applicants with not one but two arguable defences.

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In *Merrifield Ziegler v. Liverpool Cotton Association* [1912] 105 LTR 97 at 105 Eve J considered the German Code of Civil Procedure pertaining to Arbitration Proceedings which appeared to in effect provide for procedures in the German Law Courts for an arbitrator's award to be revoked or to be confirmed by means of a "distrain" order of the Law Courts. It appeared that in Germany it was necessary to obtain such a distrain or enforcement order to enforce the award. Without obtaining such an enforcement order an action was brought on the award in England. Eve J was not prepared to give judgment on the award as he thought that it would tantamount to his giving the claimants power to issue execution in England on an award in respect of which no execution could be levied in the country where it was made.

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The plaintiffs in the instant case can by way of defence be confronted with the ratio in *Merrifield, Ziegler & Co.*

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Accordingly it was my judgment that while the contention that the default judgment entered into by the plaintiffs was irregular and had no merit, the defendants have raised at least two arguable defences which in my judgment provide them with a defence on the merits. The question that then arose was whether in all the circumstances of the case I should exercise my discretion in favour of the applicants. Although the explanation for allowing judgment in default to be entered and for the 3 months' delay in applying to set it aside could have been better presented I was satisfied that at all relevant times the defendants intended to defend the action and that in all the circumstances the delay in applying to set aside the judgment was not so inordinate that I should preclude the defendants from putting forward what I have found to be defences on merits that they appear to have.

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The default judgment was set aside (as was any proceedings in execution that may have been commenced on the judgment). Since the defendants were seeking the indulgence of the Court I ordered that they should pay the costs of and incidental to the application.

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I allowed the defendants 3 days from the date of my order to enter an appearance and allowed them the 21 days that they had asked for to file and deliver a statement of defence.

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Also found at [1984] 2 CLJ 248

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